Pulau Corporation *and* Teamsters, Chauffeurs, Warehousemen, Industrial & Allied Workers of America, Local 166, International Brotherhood of Teamsters, Petitioner. Case 31–RC–153856

September 16, 2015

ORDER DENYING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Employer's Requests for Review of the Regional Director's Decision and Direction of Election and Decision and Certification of Representative are denied as they raise no substantial issues warranting review.[1]

Dated, Washington, D.C. September 16, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] Pertinent portions of the Regional Director's Decision and Certification of Representative are attached as an appendix.

In denying both of the Employer's Requests for Review, we rely on the rationale set forth by the Regional Director in her Decision and Certification of Representative, including her statement that the Board has already considered and rejected the Employer's arguments concerning the facial validity of the amendments to its representation case procedures in adopting the final rule. See 79 Fed.Reg. 74308–74430 (Dec. 15, 2014). In its Request for Review of the Decision and Certification of Representative, the Employer argues that due to the schedule of its designated representative, only 5 of the 17 days preceding to election were available to it for communicating with employees concerning the election, and that that period was insufficient. However, the Employer did not present these facts, or its argument based on them that a June 26 election gave it insufficient time to communicate with employees, to the Regional Director prior to the election, nor did it propose a later date for the election. Accordingly, the Employer's challenge to the Regional Director's designation of the election date is not properly before us. See 29 C.F.R. § 102.67(e) (formerly § 102.67(d)); *Benteler Automotive Corp.*, Case 25–RC–135839, 2014 WL 6682361 n.1 (Nov. 25, 2014); *Cook Inlet Tug & Barge, Inc.*, Case 19–RC–106498, 2014 WL 265834 fn. 1 (Jan. 23, 2014); *Coney Island, Inc.*, 140 NLRB 77, 77 fn. 1 (1962).

MEMBER MISCIMARRA, dissenting.

This case involves the Board's Final Rule on representation case procedures, with which I disagree for the reasons expressed in my dissenting views to the Final Rule. 79 Fed.Reg. 74308, at 74430–74460 (Dec. 15, 2014) (dissenting views of Members Miscimarra and Johnson). In the instant case, for similar reasons, I would grant the Employer's Requests for Review on the basis that they raise substantial questions regarding the effect and application of the Board's Final Rule.

Dated, Washington, D.C. September 16, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

DECISION AND CERTIFICATION OF REPRESENTATIVE

Based on a petition filed on June 9, 2015, and pursuant to a Decision and Direction of Election that issued on June 19, 2015, a Region 31 Board agent conducted an election on June 26, 2015 to determine whether a unit of employees of Pulau Corporation (the Employer) wish to be represented for the purposes of collective bargaining by Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters (the Petitioner). That voting unit consists of:

> **Including:** All Stock Clerks, Supply Technicians, and Electronics Technician I's and II's employed by the Employer at Building 822, Miles Warehouse, at Fort Irwin, California.
>
> **Excluding:** All other employees, managers, and guards and supervisors as defined in the Act, as amended.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots shows that 10 ballots were cast for the Petitioner and that 2 ballots were cast against representation. There were no determinative challenged ballots. Thus, a majority of the valid ballots were cast in favor of representation by the Petitioner.

The Employer filed timely Objections to the Results of the Election and an accompanying Offer of Proof. A copy of the Employer's objections is attached to this Decision. Inasmuch as I have determined that the evidence described in the Offer of Proof would not constitute grounds for Setting aside the election if introduced at a hearing, I did not order that a hearing be held regarding the Employer's objections.

THE EMPLOYER'S OBJECTIONS

The Employer generally objects to the application of the Board's Final Rule entitled "Representation – Case Procedures," 29 C.F.R. Parts 101, 102, 103, 79 Fed.Reg. 74,308 (Dec. 15, 2014) (hereafter the Final Rule). The Employer incorporates by reference each and every objection to the Final Rule raised by the Plaintiffs in their Complaints and other filings in *Chamber of Commerce of the United States v. NLRB,* 1:15-cv-00009 (D. D.C. 2015),[1] *Associated Builders & Contractors of Texas, Inc. v. NLRB,* 1:15-cv-00026 (W.D. Tex. 2015),[2] and *Baker DC, LLC v. NLRB,* 1:15-cv-00571 (D. D.C. 2015).[3] Moreover, the Employer specifically objects to the imposition of the Final Rule in the instant proceeding, asserting the Final Rule violated its due process rights because its passage and imposition in representation proceedings was arbitrary and capricious under the Administrative Procedure Act (the APA); the Final Rule unlawfully compelled it to violate the personal privacy rights of its employees by forcing the disclosure of employees' personal e-mail addresses and phone numbers; the Final Rule unconstitutionally compelled its speech; and the Final Rule compelled an election timeframe that interfered with its right under Section 8(c) of the National Labor Relations Act (the Act).

The Employer further asserts that the imposition of the Final Rule in the instant matter materially affected the outcome of the election and, therefore, a new election should be conducted in accordance with Board Rules and Regulations as they existed prior to the effective date of the Final Rule. In its Offer of Proof, the Employer states that if permitted to testify at a hearing, a witness would establish the following:

(1) that the imposition of the Final Rule unlawfully compelled the Employer to violate the personal privacy rights of its employees by forcing the disclosure of employees' personal e-mail addresses and phone numbers to the Union;

(2) that the imposition of the Final Rule unlawfully compelled an election timeframe that interfered with the Employer's rights under Section 8(c) of the Act because the Employer and its representatives did not have an adequate opportunity to exercise its right to free speech in the artificially compressed timeframe imposed by the Final Rule; and

(3) that the imposition of the Final Rule prejudiced bargaining unit employees' Section 7 rights, specifically employees' right to refrain, because employees were not exposed to a full and fair debate on the relative merits of unionization given the Employer's inability to fully exercise its Section 8(c) rights.

DISCUSSION

The Final Rule went into effect on April 14, 2015 and I am bound to apply it. Despite the Employer's contentions to the contrary, the Final Rule is lawful. Congress delegated both general and specific rulemaking authority to the Board. Generally, Section 6 of the Act, 29 U.S.C.[§] 156, provides that the Board "shall have authority from time to time to make, amend, and rescind in the manner prescribed by the Administrative Procedure Act * * * such rules and regulations may be necessary to carry out the provisions of this Act." In addition, Section 9(c), 29 U.S.C. [§] 159(c)(l), specifically contemplates rules concerning representation case procedures, stating that elections will be held "in accordance with such regulations as may be prescribed by the Board." As the Supreme Court unanimously held in *American Hospital Association,* 499 U.S. 606, 609–[6]10 (1991), the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings.

As for the Employer's general objections to the Final Rule, including those articulated in the district court documents that were incorporated by reference, all of these objections were fully answered in the Board's justification for the Final Rule, as set forth in the Federal Register. See Representation - Case Procedures, 79 Fed.Reg. 74,308 (Dec. 15, 2014). Further, in the only Federal district court decision to date substantively addressing a challenge to the validity of the Final Rule, the Final Rule was upheld. See *Associated Builders & Contractors of Texas, Inc. v. NLRB,* No. 1-15-CV-[00]026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015).

With respect to the Employer's Offer of Proof in the instant matter, for the reasons set forth below, the proffered evidence would not constitute grounds for setting aside the election if introduced at a hearing. It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854

[1] In *Chamber of Commerce of the United States v. NLRB,* the Plaintiffs asserted that the Final Rule (1) is not in accordance with the Act, exceeds the Board's statutory authority, and violates the First and Fifth Amendments of the US Constitution; and (2) is arbitrary and capricious under the APA.

[2] In *Associated Builders & Contractors of Texas, Inc. v. NLRB,* the Plaintiffs asserted that the Final Rule exceeds the Board's statutory authority by impermissibly restricting employers' ability to prepare for, present evidence relating to, and fairly litigate issues of, unit appropriateness and voter eligibility in petitioned-for bargaining units; (2) violates the Act and the APA by failing to assure to employees the fullest freedom in exercising the rights guaranteed by the Act by compelling the invasion of privacy rights of employees by disclosure of personal information prior to any determination that a union's petition is sufficient to proceed to an election; (3) violates the' Act and the APA by interfering with protected speech during union election campaigns; and (4) is arbitrary and capricious and an abuse of agency discretion within the meaning of the APA.

[3] In *Baker DC, LLC v. NLRB;* the Plaintiffs asserted that the Final Rule (I) exceeds the Board's authority delegated by Congress by imposing unprecedented disclosure requirements on Employers, including compelling disclosure of confidential, personal and private information regarding their employees; (2) impermissibly restricts employers' right to present evidence on questions concerning representation at an appropriate hearing, including issues of voter eligibility or inclusion in the bargaining unit and the requirement that employers file a written statement of position upon preclusion; (3) violates employers' first amendment and statutory rights of free speech; and (4) is arbitrary and capricious.-

(2000) (internal citations omitted). Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.,* 344 NLRB 252, 253 (2005) (internal citation omitted). To set aside an election based on Board agent misconduct or Regional office procedural irregularities, the objecting party must show that there is evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Durham School Serv[ice]s, LP,* 360 NLRB No. 108, slip op. at 4 (May 9, 2014), citing *Polymers, Inc.,* 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970).

For the reasons set forth below, the Employer failed to meet its burden to have the election set aside and also failed to proffer evidence that raises a reasonable doubt as to the fairness and validity of the election.

(1) The Final Rule did not unlawfully compel the Employer to violate the personal privacy rights of its employees.

The Employer contends that the Final Rule's requirement to disclose employees' personal contact information unlawfully compelled it to violate the personal privacy rights of its employees by forcing the disclosure of employees' personal e-mail addresses and phone numbers.

The Board, however, squarely addressed these employee privacy concerns in the Federal Register. 79 Fed.Reg. 74,341—74,351. After a lengthy discussion about the concerns regarding employees' privacy rights, the Board concluded that the substantial public interests in the fair and free choice of bargaining representatives and in the expeditious resolution of questions of representation outweigh the interests employees and employers have in keeping the information private. Specifically, the Board reasoned that the new requirements facilitate an informed electorate and an expeditious resolution of questions or representation. In the Board's view, the new requirements help to minimize any invasion of employee privacy caused by disclosure of the information because the disclosure of information is limited in a number of key respects; the information itself is limited in scope; and it is available only to a limited group of recipients, to use for limited purposes. See also *Associated Builders & Contractors of Texas, Inc. v. NLRB,* No. 1-15-CV-[00]026 RP, 2015 WL 3609116, at *11 (W.D. Tex. June 1, 2015) (concluding that the Plaintiffs' challenge to the Final Rule on the ground that it improperly invaded employee privacy failed).

Accordingly, I reject the Employer's contention that I should overturn the results of this election and order that a new election be conducted on the basis of employee privacy concerns.

(2) The Final Rule did not unlawfully compel an election timeframe that interfered with the Employer's rights under Section 8(c) of the Act.

Despite the fact that the Employer agreed to the date of the election in the Joint Stipulation agreed upon by the parties and approved by me on June 18, 2015, the Employer contends that the election timeframe under the Final Rule is unlawful because it interferes with its rights under Section 8(c) of the Act because the Employer and its representatives did not have an adequate opportunity to exercise its right to free speech in the artificially compressed timeframe imposed by the Final Rule.

Again, the Board specifically addressed these concerns in the Federal Register. 79 Fed.Reg. 74,318–74,326. As an initial matter, the Board concluded that the Final Rule is not inconsistent with Section 8(c) of the Act and the First Amendment. Section 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. [§] 158(c). On its face, Section 8(c)'s stated purpose is to prevent speech from "constitut[ing] or be[ing] evidence of an unfair labor practice." Accordingly, the Board has repeatedly held that Section 8(c) applies only in unfair labor practice and not in representation proceedings. See, e.g., *Hahn Prop. [Property Management] Mgmt. Corp.,* 263 NLRB 586, 586 (1982); *Rosewood Mfg. Co., Inc.,* 263 NLRB 420, 420 (1982); *Dal-Tex Optical Co., Inc.,* 137 NLRB 1782, 1787 fn. 11 (1962). Accordingly, because the Final Rule, which addresses representation case procedures, does not in any way permit the Board to use speech or its dissemination as evidence of an unfair labor practice, the literal language of Section 8(c) is not implicated. 79 Fed.Reg. 74,318–74,319.

Further, the Final Rule does not run afoul of the First Amendment; it does not impose any restriction on the speech of any party. As the Board explained in the Federal Register, the Final Rule does not eliminate the opportunity for the parties to campaign before an election, nor does it impose any restrictions on campaign speech. As under the previous rules, employers remain free to express their views on unionization, both before and after the petition is filed, so long as they refrain from threats, coercion, or objectionable interference. As the Supreme Court stated in 1941, "The employer is as free now as ever to take any side it may choose on this controversial issue." *NLRB v. Virginia Elec. & Power Co.,* 314 U.S. 469, 477 (1941). Likewise, the Final Rule does not impose any new limitations on union speech. Accordingly, the Board's effort to simplify and streamline the representation case process does not infringe the speech rights of any party. See also *Associated Builders & Contractors of Texas, Inc. v. NLRB,* No. 1-15-CV-[00]026 RP, 2015 WL 3609116 at *13 (W.D. Tex. June 1, 2015) (concluding that Plaintiffs' challenge to the Final Rule on the basis of impairment of free speech failed as they did not demonstrate the Final Rule impermissibly burdened speech). As highlighted by the Board, Employers will continue to have ample meaningful opportunities to express their views both before and after a petition is filed.

Accordingly, I reject the Employer's contention that I should overturn the results of this election and order that a new election be conducted on this basis.

(3) The Final Rule did not prejudice bargaining unit employees' Section 7 rights.

The Employer contends that the imposition of the Final Rule prejudiced bargaining unit employees' Section 7 rights, specifically employees' right to refrain, because employees were not exposed to a full and fair debate on the relative merits of unionization given the Employer's inability to fully exercise its Section 8(c) rights. As outlined above, and explained in more detail by the Board in the Federal Register, the Final Rule does not violate the Employer's Section 8(c) rights and it does not prejudice employees' Section 7 rights. 79 Fed.Reg. 74,318–74,326. As set forth by the Board, the Final Rule accords with the statutory policy in favor of free debate.

Accordingly, I reject the Employer's contention that I should overturn the results of this election and order that a new election be conducted on this basis.

CONCLUSION

After carefully reviewing the arguments made by the Employer, as well as its Offer of Proof, I conclude that the Employer's objections do not constitute grounds for setting aside the election.

Accordingly, I am issuing a Certification of Representative.

CERTIFICATE OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> **Including:** All Stock Clerks, Supply Technicians, and Electronics Technician I's and II's employed by the Employer at Building 822, Miles Warehouse, at Fort Irwin, California.
>
> **Excluding:** All other employees, managers, and guards and supervisors as defined in the Act, as amended.